

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>COMMONWEALTH EDISON COMPANY</b>	)	
	)	<b>No. 10-0467</b>
<b>Proposed general increase in electric rates</b>	)	

**RESPONSE OF THE PEOPLE OF THE STATE OF ILLINOIS  
AND DOMINION RETAIL, INC. TO  
TO COMMONWEALTH EDISON COMPANY'S  
MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL DIRECT TESTIMONY AND  
MOTION TO DISMISS**

NOW COME the People of the State of Illinois, by and through LISA MADIGAN, Attorney General of the State of Illinois (“the People” or “AG”) and DOMINION RETAIL, INC., by and through its attorney, pursuant to Part 200.190 of the rules of the Illinois Commerce Commission (“Commission” or “ICC”), hereby file their response to the “Motion for Leave to File Supplemental Direct Testimony” (“Motion”) filed by Commonwealth Edison Company (“ComEd” or “the Company”) on August 9, 2010. The Company’s August 9<sup>th</sup> submission was not made in compliance with Section 9-201 of the Public Utilities Act, 220 ILCS 5/1-101 *et seq.* (“the Act”). ComEd’s “Supplemental Direct” exhibits are intended to remedy the Company’s June 30<sup>th</sup> filing, which did not comply with the Commission’s order in ICC Docket 08-0532. Instead the exhibits improperly introduce new tariff revisions. Furthermore, ComEd’s Motion does not meet the requirements for the filing of supplemental testimony in Part 286.20 of the Commission’s rules. The People and Dominion ask that ComEd’s Motion be denied.

In addition, the People and Dominion move that the Commission dismiss the company’s June 30 general rate increase filing without prejudice, and the tariffs that accompany that filing,

due to the Company's failure to comply with the Commission's order in ICC Docket No. 08-0532. In support of their Response and Motion, the People and Dominion state as follows:

**I. The Commission Should Deny Commonwealth Edison's Motion for Leave to File Supplemental Direct Testimony.**

1. On April 21, 2010, the Commission issued its Final Order in Docket No. 08-0532. In that order, the Commission directed ComEd to provide an Embedded Cost of Service Study ("ECOSS") pursuant to certain specifications to be considered as part of its next rate filing. The findings in that order stated, *inter alia*, that

(4) the following decisions are final and should be reflected in the ECOSS for consideration in any subsequent action in the Company's next rate case:

- a) customers receiving power at 4kV or higher are primary system customers who should be identified. Rates charged to these customers should be adjusted to reflect that they do not use the secondary distribution system;
- b) customers receiving power at levels below 4kV should be considered secondary system customers and charged accordingly;
- c) the City of Chicago's responsibility for overhead and maintenance costs for Dusk to Dawn street lighting should be consistent with that of other members of the Dusk to Dawn lighting class;
- d) the City of Chicago's method for calculating Dusk to Dawn street lighting service connections in the ECOSS is adopted;
- e) the City of Chicago's method for calculating the proportionate share of the cost of operating ComEd's secondary distribution system for Dusk to Dawn street lighting purposes is adopted;
- f) the allocation of costs to substations and primary lines should be made on a coincident peak basis;
- g) customer services costs should be separated between residential and non-residential customers and costs related to customer information should be recovered based on usage;
- h) uncollectible debt expense costs should be allocated across all residential classes;

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(5) in its next rate filing, ComEd should provide an updated ECOSS consistent with this Order for consideration in that proceeding;

(6) issues relating to the primary/secondary split, street lighting and customer care costs as discussed herein shall be addressed in a subsequent rate filing;

(7) in its next rate filing, ComEd should file an embedded cost of service study for its customer care costs.

IT IS HEREBY ORDERED that the decisions set out in Finding (4) hereinabove are final and should be reflected in the Company's next rate case.

IT IS FURTHER ORDERED that Commonwealth Edison Company should file an updated ECOSS for consideration in its next rate filing as outlined herein.

IT IS FURTHER ORDERED that Commonwealth Edison Company shall file an embedded cost of service study for its customer care costs in its next rate filing.

ICC Docket No. 08-0532, Order of April 21, 2010 at 84-85.

2. Section 9-201 of the Act requires tariffs to be filed with the Commission in a form that would permit the proposed rates to go into effect after 45 days, should the ICC elect not to suspend them. The Act directs that tariff filings reflect the date of filing and a date certain upon which the proposed rates will go into effect should the Commission elect not to investigate the filing. Section 9-201(a) also specifies certain publication requirements associated with the filing of new tariffs, including publication in a newspaper of general circulation "or such other notice to persons affected by such change". 220 ILCS 5/9-201(a).

3. ComEd's June 30<sup>th</sup>, filing, consisting of 67 pages of proposed tariff changes, with each sheet dated June 30th, 2010, designating an August 14, 2010 effective date, constituted such a

filing under Section 9-201.<sup>1</sup> The ICC suspended the tariffs pursuant to Section 9-201 of the Act which triggered an 11-month examination of the Company's rate filing. 220 ILCS 9-201(b) (assuming a resuspension of the tariffs is granted). The company's rate increase filing did not include the new ECOSS, as defined in the Commission's 08-0532 Order, and the tariffs it filed on that date did not reflect the rate design dictated by the new ECOSS the ICC had ordered it to produce.

4. On August 9, 2010, 40 days after the Company requested a change in rates pursuant to Section 9-201 of the Act, ComEd produced several new cost of service studies, including: (1) a Switching Study that analyzes the costs ComEd incurs in providing services associated with customer switches from ComEd to a retail electric supplier; (2) an Allocation Study that examines the costs ComEd incurs in providing customer services and allocates these costs between delivery and supply; (3) a Distribution Loss Study that reflects "the results of the primary/secondary analysis described by Messrs. Alongi and Garcia (ComEd Ex. 21.0); and (4) a new ECOSS that includes a new customer class – "Primary", which changed the ECOSS originally filed on June 30, 2010. *See, gen'ly*, ComEd Ex. 19.0, ComEd Ex. 20.0, ComEd Ex. 21.0 and ComEd Ex. 22.0. The Company served these new studies and supporting testimony on ICC Staff and intervening parties as "supplemental direct testimony" and produced new tariff sheets to reflect the new cost studies. The rate changes listed on the tariff sheets were not filed as changes to existing tariffs – as they would have been had they been filed in the June 30th rate increase request case -- but were instead filed as documentary exhibits to the testimony supporting the ECOSS.

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<sup>1</sup> August 14, 2010 is 45 days from the June 30, 2010 filing date, in compliance with the 45-day advance notice requirement set forth in Section 9-201(b).

5. ComEd's "Supplemental Direct Testimony" includes ComEd Exhibit 21.3, consisting of 31 pages of changes to the June 30<sup>th</sup> tariff filing and to existing rates. The Company's August 9<sup>th</sup> filing is not mere supplemental testimony, but a significant portion of the cost study and resulting rate design changes that the Commission's April 21<sup>st</sup> Order directed be filed with ComEd's next rate case. Both the new cost of service studies and revisions to the tariff sheets provided by the Company to Staff and intervenors on August 9<sup>th</sup> could have been— and should have been - part of ComEd's initial rate increase request filing.

6. The formal filing of tariffs triggers the Commission's authority to consider the propriety of the proposed changes by suspending the tariffs, pursuant to the notice and hearing provisions of the Act:

Whenever there shall be filed with the Commission any schedule stating an individual or joint rate or other charge, classification, contract, practice, rule or regulation, the Commission shall have power, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate other charge, classification, contract, practice, rule or regulation, and pending the hearing and decision thereon, such rate or other charge, classification, contract, practice, rule or regulation shall not go into effect.

220 ILCS 5/9-201(b) (emphasis added).

7. The August 9<sup>th</sup> tariffs were not dated as of the date of filing, did not include an effective date (both of which are required by Section 9-201), and are not listed anywhere in the Commission's "Daily Tariff Filings. Lacking the effective date certain required by the Act, they are facially invalid. Had ComEd complied with the Act's provisions for announcing its intention

to change its existing tariffed rates, the filing of those tariff changes would have triggered the Commission's authority to suspend and investigate the tariffs for as long as 11 months. Instead, the tariff changes were submitted to Staff and the parties as documentary exhibits. In effect, ComEd's unlawful submission of tariff changes on August 9<sup>th</sup> is nothing more than an attempt to avoid the re-tolling of the Commission's suspension period and the initiation of as much as 11 months of scrutiny by the ICC Staff and intervenors.

8. Regardless of whether or not the Commission elects to investigate a utility tariff filing, the filing must be made to provide the public with notice of the change and to toll the suspension period, during which the Commission has the authority to decide to suspend and investigate the changes or let the tariffs go into effect. ComEd's Motion for Leave to File Supplemental Testimony makes no mention of the new tariffs that accompanied the August 9<sup>th</sup> filing or any indication that the company complied with the notice requirements provided for in Section 9-201 of the Act.

9. The Staff of the Commission and the parties to this case are extremely prejudiced by the manner in which ComEd has presented its proposal to increase rates. Some of the tariff sheets filed on August 9<sup>th</sup> modified some of the properly filed June 30<sup>th</sup> tariff sheets. Other tariff sheets presented to the parties on August 9<sup>th</sup> represented totally new rate changes. Others reflected the creation of a brand new rate class. Again, these tariff changes and cost studies were presented to the Commission Staff and intervening parties for the first time on August 9<sup>th</sup>, 40 days after the tolling of the Commission's suspension period associated with the original June 30<sup>th</sup> rate increase filing.

10. As a result of ComEd's delinquency, the Staff and the intervenors have been forced to acquiesce to a bifurcated schedule, obligating the parties and their witnesses to consider substantial changes to ComEd's June 30<sup>th</sup> filing, including a new ECOSS, additional cost studies, supporting testimony and related tariffs in a period of time less than the Commission has designated for the rest of ComEd's request and significantly less than the full 11 months permitted under Section 9-201(b) of the Act. Rate cases are enormously complex undertakings, involving a plethora of issues, many pages of often very technical testimony, lengthy briefs and days of cross-examination. The statutory 11-month deadline makes it difficult to effectively review the myriad issues and to develop a thorough record upon which the Commission can base its order. ComEd's bifurcated tariff submission procedure makes a challenging situation worse and effectively prevents the Commission from suspending the new August 9<sup>th</sup> tariff changes and prevents Staff and interested intervenors from examining the cost studies and requested rate changes for the statutorily-permitted time.

**II. The Commission Must Strictly Enforce the Public Utilities Act, Reject Commonwealth Edison's June 30<sup>th</sup> Tariff Filing and Dismiss this Proceeding Without Prejudice.**

11. As explained in paragraph 1 above, on April 21, 2010, the Commission directed ComEd to supply a new Embedded Cost of Service Study in its next rate filing. ComEd failed to do so, in violation of the Commission's explicit directive contained in that order. As further explained above, ComEd attempted to "cure" this violation by submitting a new ECOSS and the rate changes that would result from that study by submitting supplemental direct testimony supported by testimonial exhibits in the form of tariff sheets.

12. The Commission now has before it two sets of tariffs: one set of tariffs that were suspended by the Commission on July 28, 2010 and are currently the subject of investigation, and a second set of tariff change proposals that were not properly filed and hence have not been suspended by the Commission.

13. The Commission is an administrative agency whose power is derived from the legislature. *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 146 Ill.2d 175, 585 N.E.2d 1032 (1991). Pursuant to the Act, the Commission has “general supervision of all public utilities.” 220 ILCS 5/4-101. As such, the Commission has the duty to oversee and supervise both the tariff filing process and the rate investigation process outlined under Section 9-201 of the Act.

14. The Commission should assert its authority and establish by a definitive decision, through a formal ruling, that a utility’s proposal to change tariffed rates in the manner chosen by ComEd is unlawful, thus sending a strong signal to public utilities and other entities under its jurisdiction that the Commission will strictly enforce the tariff and notice requirements of the Public Utilities Act. Without such a Commission ruling in these proceedings, the practice of submitting tariff change proposals as has occurred in this case will give license to ComEd and any other utility to repeat this practice, citing the Commission’s acceptance of these deviations from the Act as somehow legally permissible. Permitting ComEd to file bifurcated rate change proposals in the guise of supplemental direct testimony creates a dangerous precedent that threatens Staff and Intervenors’ due process rights. A substantial public interest may require a ruling where the question is of a public nature, there is a desirability of an authoritative determination for the future guidance of public officers, and there is a likelihood of future recurrence of the question. *Brink’s, Inc. v. Illinois Commerce Commission*, 79



Ill.App.3d 275, 398 N.E.2d 296, 297 (1979). There is a substantial public interest involved in deciding this issue and providing guidance to other public utilities. In addition, ratepayers affected by the changes to rates proposed in the supplemental direct tariffs may be unaware of the changes due to the utility's failure to abide by the notice provisions of Section 9-201.

13. Moreover, the refusal of an agency to reject a tariff that conflicts with a statute, agency regulation or order may be reviewed by the courts. *Associated Press v. F.C.C.*, 448 F.2d 1095, 1103 (1971), The June 30<sup>th</sup> filing was not compliant with the ICC's April 21<sup>st</sup> order in Docket No. 08-0532 and ComEd's August 9<sup>th</sup> submission was made in violation of Section 9-201 of the Act. Should the Commission elect to accept either of these filings, that decision may be considered by an appellate court as beyond the Commission's *jurisdiction*.

14. *Unlike the right to suspend* or investigate a tariff, the Commission's duty to enforce the Public Utilities Act is not discretionary. In this case, permitting ComEd to pursue an *ad hoc* tariffing procedure in violation of the Act would constitute a reviewable action for the appellate court. Where the rates proposed on August 9<sup>th</sup> were substantially different from those having been properly filed on June 30<sup>th</sup> and where the due process rights of ICC Staff and the parties are undoubtedly impacted by the truncated review period that ComEd's bifurcated process would force on them, the Commission is not free to accept either the June 30<sup>th</sup> tariffs or the flawed August 9th submission that purports – but fails -- to repair them.

15. ComEd's August 9<sup>th</sup> filing did not bring the June 30th filing into compliance with the Final Order in 08-0532. The August 9<sup>th</sup> rate changes were presented by the Company without having made the requisite tariff filing with the Commission and without providing the public notice required by Section 9-201 of the Act , thereby eliminating the Commission's opportunity to suspend those tariffs and conduct a public investigation of the proposed rates for a full 11

months. Therefore, the Company's request for an increase to its revenue requirement has not been properly presented to the Commission in the manner dictated by the Commission's order in Docket No. 08-0532 or in the manner dictated by the Act.

16. Even if the August 9<sup>th</sup> tariff sheets were compliant with the Act and the ICC's April 21, 2010 Order, the documents served on the parties on August 9<sup>th</sup> do not constitute supplemental direct testimony under the Commission's rules of practice. Section 286.20(b) of the Commission's administrative rules provides that the submission of supplemental direct testimony is not precluded "with good cause shown." 83 Ill. Adm. Code 286.20(b). This provision states that "[i]n determining whether good cause has been shown, the Commission shall consider, among other things, the degree to which the information that is the subject of the supplemental direct testimony was not known to the utility at the time direct testimony was filed, and the degree to which facts have changed due to circumstances beyond the control of the utility." 83 Ill. Admin. Code Part 286.20 (b).

17. ComEd's Motion does not supply the requisite good cause required by the Commission's rules to allow the filing of supplemental direct testimony, let alone submitting a new ECOSS and other cost studies, their associated tariff changes and supporting testimony 40 days after it asked the Commission for a rate increase. Indeed, arguably, ComEd provided no reason at all, merely claiming that "there was insufficient time to reflect all of that order's (Docket No. 08-0532) directions in the June 30 filing." ComEd Motion at 1. This statement is meaningless, given that the date for filing a rate increase request is entirely within the Company's control and choosing. Clearly, the Company did not wait to file a rate case with an ECOSS that complied

with all of the directives of the Commission's 08-0532 Order. Whatever purpose ComEd's June 30<sup>th</sup> filing was designed to serve cannot be a reason to prejudice ICC Staff and other parties, hamper their ability to conduct a thorough analysis of ComEd's proposals or preclude the development of the full record the Commission will require to make a sustainable final decision. The People and Dominion submit that the Company's desire to file a rate case by June 30 does not constitute the kind of "good cause" that Part 286.20(b) requires.

18. If ComEd's rate case filing was not ready on June 30<sup>th</sup>, it should not have filed its request on that date. The Commission should not capitulate to ComEd's attempt to write its own rules, in defiance of the Act and the Commission's orders, or to its insistence that Staff and intervenors accede to ComEd's plan to have new rates in place by the summer of 2011. The Company's delivery service rate increase request is not properly before the Commission and must be refiled if the Commission is to suspend and investigate the tariff changes being proposed by ComEd.

19. In an attempt to expeditiously resolve the matters raised in the People and Dominion's Motion to Dismiss, the People and Dominion request that the Administrative Law Judges set the following briefing schedule on the motion:

All Responses due: August 6, 2010

Reply due: August 12, 2010

20. WHEREFORE, the People and Dominion request that the Commission (1) deny ComEd's Motion for Leave to File Supplemental Direct Testimony, as well as the tariffs that accompanied that filing, pursuant to Section 9-201 of the Act and Part 286.20 of the

Commission's rules; and (2) dismiss without prejudice ComEd's June 30 request for a general increase in electric service delivery rates, as noncompliant with its Order in ICC Docket No. 08-0532, and reject the tariffs that accompanied that filing. ComEd's August 9<sup>th</sup> filing did not bring the June 30<sup>th</sup> filing into compliance with the Final Order in 08-0532. The August 9<sup>th</sup> rate changes were presented to the parties without having made the requisite tariff filing with the Commission and without having filed notice with the public. Therefore, the Company's revenue requirement proposal has not been properly presented to the Commission in the manner dictated by the Public Utilities Act, the Commission's order in Docket No. 08-0532 and the Commission's own rules.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS

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